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by mail and email

Robert S. Khuzami
Director, Enforcement Division
US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: FCPA Civil Penalty and Disgorgement Proceeds

Dear Mr. Khuzami:

We write on behalf of the Socio-Economic Rights and Accountability Project ("SERAP"), a non-governmental "civil society" organization in Nigeria (www.serap.org), in regard to civil penalty and disgorgement proceeds that companies agree to pay to resolve US Foreign Corrupt Practices Act investigations. Currently such proceeds, once paid, are retained by the US government.

Specifically, SERAP respectfully requests that the Enforcement Division establish a case-by-case policy or process that would enable foreign governmental entities that have been victims of corruptly-procured contracts to apply for, subject to appropriate anti-corruption safeguards, some or all of the civil penalty and disgorgement proceeds that would eventually be paid by companies alleged to have violated the US Foreign Corrupt Practices Act. SERAP also suggests that civil society groups in the home country, or US-nonprofit organizations serving that country, be eligible within a short time-period to apply for such proceeds as well, or instead, for use for "public benefit projects" in the affected foreign country, again subject to anti-corruption safeguards. For reasons to be explained, SERAP submits that this proposal would not impede the Division's enforcement priorities.

Before describing SERAP's suggested means for implementing its request, we provide some background information about SERAP's role as an NGO in Nigeria, about the high costs of corruption in Nigeria and other developing countries as well as the limited time opportunities for victims to seek redress, and about the US and international law background and rationale for SERAP's request.

- SERAP is Well-Qualified to Propose and to Help Implement Sensible Discretionary Remedies for Victims of FCPA Violations.

In a country where systemic corruption and the resulting poverty, inequality and discrimination deprive many Nigerians of dignity and freedom to explore ways towards development and prosperity, SERAP works to hold government and public officials at the local, state and federal levels accountable for acts of corruption, which are conducive to violations of socio-economic rights of citizens. SERAP also aims to ensure Nigeria's full compliance with the human rights and anti-corruption treaties to which it has voluntarily subscribed. There are similar NGOs in other developing countries plagued by bribery and corruption.

SERAP and many comparable developing country NGOs are members of the UN Global Compact. They work closely with its office in New York to contribute to the Global Compact's objective of requiring businesses to work against corruption in all its forms, including extortion and bribery. SERAP also coordinates with Transparency International in Nigeria and Amnesty International in London. In addition, SERAP works with the UNCAC Coalition, a group of civil society organizations promoting the implementation of the UN Convention Against Corruption; among the Coalition's US members is the American Bar Association's Rule of Law Initiative.

SERAP receives support for its work from the MacArthur Foundation USA, The Royal Netherlands Embassy in Abuja (Nigeria's capital), the Open Society Initiative for West Africa (OSIWA) in Abuja, the National Endowment for Democracy USA, the International Commission of Jurists (ICJ), Amnesty International's International Secretariat in London, and the West African Bar Association , among others. Members of SERAP's International Advisory Board include Professor Dinah Shelton of George Washington University Law School, and Professor Donald Kommers of Notre Dame.

- SERAP's Experience in Nigeria Confirms That Bribery and Corruption Increase Costs to Victimized Government Entities And to Society At Large But That Damage Remedies Are Often Elusive.

It is axiomatic that victimized foreign government entities bear the cost of bribery and corruption of their officials. Procurement and investment agreements corrupted by bribery invariably lead to increased costs, not only in higher prices but also in needlessly expanded and ultimately inefficient projects. This usually results in excess costs of at least 10 percent as a direct result of the bribery and corruption. This has often been the case in Nigeria.

Victimized governmental agencies are, however, typically without a practical remedy for recovering their economic injury attributable to bribery and corruption. The US FCPA and similar laws in other OECD member states do not provide for private enforcement. International arbitration, if available under the terms of a contract, and if the home country government even permits a victimized entity to pursue it, is expensive and highly time-consuming, particularly when large multinational companies are defendants. While local law can, in theory, provide for a remedy, litigation in the local courts is often fraught with political risk, and can be time-consuming and expensive in the best of circumstances; even if such cases are eventually

successful, enforcement of judgments, locally and internationally, present formidable challenges as well. In SERAP's experience, all of this is true in the Nigerian context.

- Given the Broad Rationale for the FCPA, SERAP's Proposal is Compatible with the SEC's Traditional Focus on Protecting US Investors and Promoting Efficient US Capital Markets.

SERAP acknowledges that under the US securities laws the Securities and Exchange Commission's principal regulatory objectives are the protection of investors in securities publicly traded in the US and the promotion of fair and efficient domestic capital markets. The US FCPA, however, is based on other objectives as well. FCPA not only seeks to ensure that US public companies and their foreign subsidiaries maintain accurate and complete books and records but also seeks, for national security and foreign policy reasons as well, to prohibit virtually all bribery of foreign government officials by individuals and companies subject to US jurisdiction. The pre-FCPA scandal of Lockheed's having bribed senior Japanese officials dramatizes this point: namely that pervasive bribery, once revealed, has the potential to destabilize the governments of important US allies, then in the Cold War and now in the wars on terrorism and on nuclear proliferation.

Since the enactment of FCPA in 1977, moreover, many other countries have enacted equivalent laws for similar broad reasons. Notably, the preamble to the 2003 UN Convention Against Corruption, which the US has ratified, includes as its foundation the following "concerns":

> about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values, and justice, and jeopardizing sustainable development and the rule of law.

Bribery and corruption by individuals and companies subject to US jurisdiction at minimum can likewise foster resentment against the US generally, particularly among large segments of the population that may already be hostile to the US. In this regard many citizens in a country where such bribery has occurred might consider FCPA civil penalties and disgorgement payments imposed by the US, and then kept by the US, as in fact representing funds that rightfully "belong" to the victim. Disgorgement, after all, is a remedial, not punitive, measure. SERAP's proposal addresses this probable source of resentment.

SERAP acknowledges that in a recent criminal FCPA case the Department of Justice successfully opposed the request of the victimized Costa Rican agency for a restitution payment from the alleged bribe payer, Alcatel-Lucent. In re Instituto Costarricense de Electricidad, 11th Cir, No 11-12707-8-G (June 17, 2011). There DOJ successfully argued that in essence, because the senior employees of the Costa Rican entity were pervasively corrupt, the entity itself was a guilty co-conspirator and thus was not entitled to restitution under US criminal laws. The Department also argued that the amount of possible restitution would be speculative, or at least difficult to determine.

The Department's successful fact-specific arguments in that criminal case ought not to preclude consideration of SERAP's request for the adoption of a case-specific process. Indeed DOJ acknowledged in a brief (at p 7) filed before the trial judge in that case that " [t]his is not to say that in each instance in which a foreign official has solicited and has been paid bribes the ministry or state-owned entity for which he or she involved could never be considered a victim." In any event, as to the "equities" issue, the Enforcement Division must acknowledge that not all foreign entities whose officials have been bribed were pervasively corrupt. More importantly, even formerly corrupt government entities have the capacity for redemption. It could surely breed resentment if they did not have the opportunity to establish their own anti-corruption bona fides.

As SERAP has noted above, there are strong policy arguments for the Enforcement Division recognizing this fact of possible redemption, and SERAP's proposal addresses this by requiring a requesting government entity to show that it now has adequate anti-corruption safeguards in place. As to the "damages" issue, experience indicates that corruptly procured contracts "cost" the victim entity at least 10 percent extra. Indeed, this figure ought to be a presumed measure of possible funds available for third-party application in the context of a civil FCPA settlement, particularly since the Enforcement Division typically settles an investigation before extensive evidence of damages, as opposed to liability, is placed in the public realm.

For these reasons SERAP respectfully submits that the Enforcement Division should exercise its enforcement discretion under the FCPA, as well as under important precepts of international law, to establish an efficient case-by-case process for the payment of some or all of FCPA civil penalty and disgorgement proceeds to or for the benefit of the victimized foreign government agency or the citizens of the affected foreign country.

- <u>The Framework of SERAP's Proposal.</u>

It is important to note at the outset that SERAP's proposal is not intended to to interfere with the Enforcement Division's full discretion to investigate and to resolve possible FCPA violations. Actually, SERAP's proposal would only come into play after an FCPA matter has been resolved, typically as a result of a settlement with the company under investigation. SERAP respectfully submits that its proposal should not be limited to disgorgement payments alone because some settling parties might agree to pay only civil penalties

Specifically, SERAP proposes that after, and only after, public notice of an FCPA settlement agreement, the victim foreign government entity and any applicant NGO would have 60 days to file a request that the Enforcement Division pay some or all of the agreed payment proceeds to or for the benefit of the victim government entity or to a home country-based or US-based NGO that would present a proposal spend the proceeds for public purposes (e.g. on public health programs) in the country of the victim entity.

Thereafter the Enforcement Division would have 60 days to act upon the request, favorably or not in its discretion; in this context the Enforcement Division should provide a brief statement of its reasons for its decisions. In reaching its decisions the Enforcement Division would have the inherent authority to consult with Executive Branch agencies of the US government.

Under SERAP's proposal it would, of course, be incumbent upon an entity seeking such proceeds to demonstrate that it has adequate anti-corruption safeguards in place, including the sort of rigorous anti-bribery compliance programs that the Enforcement Division expects companies subject to its jurisdiction to maintain. We assume that such well-known US non-profit organizations such as the Bill and Melinda Gates Foundation and The Carter Center, both active in the public health area, have such effective programs in place and would be presumptively qualified to apply for such proceeds. NGOs in developing countries would need to demonstrate similar capabilities, either before applying or during the 60-day approval period.

Conclusion

This letter provides the basic reasons for and elements of SERAP's proposal. In considering this novel proposal, the Enforcement Division might wish to publish a notice seeking public comments on the concept and the details for its implementation. SERAP stands ready to cooperate in such efforts and to respond promptly to whatever questions the Enforcement Division or the public may have.

Thank you for your consideration of this letter.

Very truly yours,

Alexander W. Sierck
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